# STATE OF MICHIGAN

# COURT OF APPEALS

SAUNDRA L. GENTRY,

Plaintiff-Appellee,

v

THOMAS A. GENTRY,

Defendant-Appellant.

UNPUBLISHED
August 14, 2014

No. 313666
Ottawa Circuit Court
LC No. 11-069419-DM

Before: M. J. KELLY, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this divorce action, defendant, Thomas A. Gentry, appeals the trial court's July 3, 2012, judgment of divorce, which was entered following a bench trial. We affirm in part, reverse in part, and remand for an evidentiary hearing to determine the reasonableness and amount of defendant's attorney and expert witness fees.

Defendant first argues that the trial court's percentage division of the assets between the parties was inequitable. This argument is without merit.

We review for clear error the trial court's findings of fact regarding the division of marital assets. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). A finding is clearly erroneous if, after a review of the entire record, this Court is left with the definite and firm conviction that a mistake was made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). If the findings of fact are upheld, this Court must determine whether the dispositional ruling was fair and equitable in light of those facts and that decision should be affirmed unless this Court is left with a firm and definite conviction that the division of assets was inequitable. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

A judgment of divorce must include a determination of the property rights of the parties. MCR 3.211(B)(3); *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003). Absent a binding agreement, the goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008). The division need not be mathematically equal, but any significant departure from congruence must be clearly explained. *Id*. at 717. To reach an equitable division, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health and needs, fault or past misconduct, and any other equitable circumstance.

*McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996). "The determination of relevant factors will vary with the circumstances of each case, and no one factor should be given undue weight." *Woodington*, 288 Mich App at 363.

The trial court valued the marital estate at $2,118,852 and awarded 45% of the assets to defendant and 55% of the assets to plaintiff, Saundra L. Gentry. The trial court justified the unequal distribution on the basis that (1) plaintiff earned 80% to 90% of the parties' total income over the course of the marriage, (2) even though the parties agreed that defendant would stay at home with the children beginning in 2000, his share of the homemaking and childcare duties was similar to that of plaintiff after defendant began trying to operate his business, TAG Marine Performance, LLC, (3) defendant was verbally and physically abusive to plaintiff, (4) defendant was voluntarily underemployed to maximize his spousal support claim, and (5) defendant's financial misdeeds and concealment. Following a review of the entire record, we are not left with a firm and definite conviction that the trial court made a mistake in these findings. *Beason*, 435 Mich at 805. We conclude that the 55/45 split of the assets was fair and equitable in light of all of the circumstances. *Sparks*, 440 Mich at 151-152; *Berger*, 277 Mich App at 716-717. We note that, contrary to defendant's assertion, the tenor of the opinion does not establish that the trial court's percentage distribution of the marital property was meant to punish defendant for his behavior over the final years of the parties' marriage. The split is not extreme. Cf. *Berger*, 277 Mich App at 722 (holding that a 70-30 split constituted punishment where trial court's distribution appeared to be punishment for the defendant's affair); *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994) (concluding that a the trial court's 23-77 split of marital property was not justified by a finding of fault).

Defendant next argues that the trial court should have ordered plaintiff to pay the equalization payment immediately because she received liquid assets in the property distribution. Defendant cites no authority to support this assertion, and it is abandoned. *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). Regardless, even if we were to address the issue, the trial court's stated reasons for the delay in payment are supported by the record and its decision to structure the equalization payment over a period of time is fair and equitable under the facts of this case. *Sparks*, 440 Mich at 151-152.

The trial court also did not abuse its discretion by declining to award interest on the equalization payment. *Reigle v Reigle*, 189 Mich App 386, 393; 474 NW2d 297 (1991). The goal in awarding interest is to encourage compliance with court orders and to prevent a windfall to the delinquent party who would gain interest on the money owed during the period when it is due but has not been paid, *Ashbrenner v Ashbrenner*, 156 Mich App 373, 376; 401 NW2d 373 (1986), not to compensate a party for the lost use of funds. *Reigle*, 189 Mich App at 394. The trial court recognized the goals set forth in *Ashbrenner*, and did not abuse its discretion by not awarding interest when neither goal was present to justify an award of interest.

Defendant also argues that because the trial court valued Monaco Real Estate, LLC—a holding company for plaintiff to own the building in Grand Haven from which plaintiff's business, Sandi Gentry Real Estate, operates—using the market approach to value, rather than the income approach to value used by defendant's expert, the rental and other income derived by Monaco from Sandi Gentry Real Estate is not accounted for in the trial court's valuation of the property. Defendant asserts that the $58,500 rental payment made by Sandi Gentry Real Estate

to Monaco was thus not attributed to either the valuation of Monaco or to plaintiff as earned income for purposes of determining spousal support. He then challenges the award of spousal support.

On appeal, we review for clear error the trial court's factual findings as related to spousal support. *Beason*, 435 Mich at 805; *Loutts v Loutts*, 298 Mich App 21, 25; 826 NW2d 152 (2012). The findings are presumptively correct and the burden is on the appellant to show clear error. *Beason*, 435 Mich at 804-805.

The trial court did not clearly err by declining to include in plaintiff's gross income, when calculating spousal support, the $58,000 in rent Sandi Gentry Real Estate paid to Monaco. *Id*. When calculating plaintiff's income for the purpose of spousal support, the trial court noted her taxable income for 2005 through 2010, calculated her average taxable income over the prior three years, and concluded that plaintiff's 2011 gross commissions were an indicator that her taxable income would remain in line with the average income. A review of the record makes it clear that the accounting books for Monaco and Sandi Gentry Real Estate were not reliable because of the manner in which many expenses were inappropriately attributed to, and categorized between, those two entities. Because there is evidence that many of the business expenses, not just the $58,000 above-market "rent" payment, were improperly distributed between Monaco and Sandi Gentry Real Estate, the trial court did not clearly err by declining to make only one correction to Saundra's income—the $58,000 in rental income—for purposes of calculating spousal support and instead relied on the income as reported on the parties' income tax returns. *Beason*, 435 Mich at 805.[1]

We also conclude that the trial court did not abuse its discretion by awarding defendant spousal support of $3,000 for a period of 4 years. If after entry of a judgment of divorce the award to either party is insufficient for the suitable support of either party, the court may award spousal support "as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case." MCL 552.23(1). A strict formula to calculate spousal support is not used and the award should reflect what is just and reasonable under the circumstances of the case. *Loutts*, 298 Mich App at 30. The objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and reasonable under the circumstances of the case. *Id*. at 26. Among the factors that should be considered are: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the abilities of the parties to work; (4) the source and amount of property awarded to the parties; (5) the parties' ages; (6) the abilities of the parties to pay alimony; (7) the present situation of the parties; (8) the needs of the parties; (9) the parties' health; (10) the prior standard of living of the parties and whether either is responsible for the support of others; (11) contributions of the parties to the

[1] To the extent that defendant also challenges the trial court's valuation of the Grand Haven building, we conclude the trial court's rejection of the income approach to value is supported by the record evidence and that the trial court's valuation is not clearly erroneous because it is within the range established by the proofs. *Jansen*, 205 Mich App at 171.

joint estate; (12) a party's fault in causing the divorce; (13) the effect of cohabitation on a party's financial status; and (14) general principles of equity. *Id*. at 31.

The trial court reviewed all 14 factors in determining the spousal support award. While the objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, *Loutts*, 298 Mich App at 26, the trial court specifically concluded that a balancing of the incomes would not be equitable in this case, regardless of plaintiff's disposable income, because of defendant's record-supported physical abuse and stalking. In addition, the record supports the trial court's conclusion that defendant has been purposely underemployed. The trial court recognized that Thomas has earned a good salary in the recent past and noted Thomas's concealment of numerous, concealed financial misdeeds during the marriage. Under these circumstances and regardless of the respective incomes attributed to the parties, the trial court's decision to not award more support to Thomas for a lengthier period of time is just and reasonable in this case. *Id*.; *Hanaway v Hanaway*, 208 Mich App 278, 295; 527 NW2d 792 (1995).

Defendant next argues that the trial court erred by awarding him his SEP/IRA because it inflated the amount he received in the asset allocation. He also argues that the trial court erred by crediting plaintiff with the 2010 taxes she paid for the early withdrawal from his SEP/IRA.

Absent a binding agreement, the goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *Berger*, 277 Mich App at 716-717. However, "when a party has dissipated marital assets without the fault of the other spouse, the value of the dissipated assets may be included in the marital estate." *Woodington*, 288 Mich App at 368, citing 2 Michigan Family Law (6th ed, 2008 supp), Property Division, § 15.21.

The trial court did not clearly err by finding that defendant cashed out his SEP/IRA in 2008 without plaintiff's knowledge. *Woodington*, 288 Mich App at 355. It was within the trial court's discretion to include the value of Thomas's SEP/IRA in the marital estate, assign its value to defendant, and credit plaintiff with the resulting tax liability because defendant is the party who concealed the withdrawal and ultimately wasted the asset. *Id.* at 368.

The trial court also did not clearly err by finding that plaintiff's 2011 income taxes were a marital debt. *Woodington*, 288 Mich App at 355. Although defendant moved out of the marital home in March 2011, the parties were still legally married for the 2011 tax year. Thus, the income and its associated tax liabilities from plaintiff's real estate business were marital income and debt. *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997); 2 Michigan Family Law, Property Division (7th ed, 2013 supp), § 15.33, pp 15-16. In addition, plaintiff used her income to maintain the marital residence and rental properties, pay the children's bills including their school tuition, and pay spousal support. Because it is proper to credit the paying party of a marital debt in the property division for assuming that marital debt, 2 Michigan Family Law, Property Division (7th ed, 2013 supp), § 15.37, pp 15-39, the trial court did not abuse its discretion by crediting plaintiff for the taxes. *Sparks*, 440 Mich at 151-152.

Defendant also challenges the trial court's valuation of the marital home, arguing that the trial court abused its discretion by adopting the lowest of 6 values offered at trial. We disagree.

This Court gives special deference to a trial court's findings when based on the credibility of the witnesses. *Johnson v Johnson*, 276 Mich App 1, 10-11; 739 NW2d 877 (2007). A trial court's valuation of property is not clear error when the value is within the range established by the proofs. *Jansen*, 205 Mich App at 171. A trial court is in the best position to judge the credibility of the witnesses and, therefore, has great latitude in arriving at a final valuation of a marital asset on the basis of divergent testimony about the asset's value. *Pelton v Pelton*, 167 Mich App 22, 25-26; 421 NW2d 560 (1988).

In this case, the trial court reviewed in detail the various opinions of value offered by the various witnesses, as well the state equalized value (SEV) of the home, and concluded that the value offered by plaintiff's expert was the most credible. With the exception of one comparable he used to demonstrate the negative effect of an indoor pool on a home's value, plaintiff's expert used relatively recent comparable sales on Spring Lake, unlike defendants' experts. In addition, plaintiff's expert testified that SEV is not a good indicator of value in the current market because of price fluctuations over the years. Granting great latitude to the trial court's decision that the appraisal of plaintiff's expert was more credible, *id.*, the trial court did not clearly err by valuing the marital property at $975,000 where the value is within the range established by the proofs. *Jansen*, 205 Mich App at 171.

Defendant next claims that the parties agreed that there was no equity in the Elm Street building and that the trial court clearly erred when it found otherwise. The record does not support this assertion. The trial court's January 13, 2012, order regarding spousal support and return of personal property, established that defendant was awarded the Elm Street building on the assumption that there was no equity in the building. However, the order also indicated that if there was equity in the building, defendant had the right to decide whether to retain the building as his sole and separate property, or have the court decide as to which party should be awarded the asset. By the plain language of the order, the issue of whether there is equity in the building was reserved to trial. The trial court rejected the assumption of a $200,000 value on the basis of plaintiff's testimony that the building was worth $230,000 and additional testimony that $30,000 to $40,000 in improvements to the building were made by the building's tenant. The $230,000 value is supported by the testimony and is thus not clear error. *Sparks*, 440 Mich at 151. Because equity exists in the building, and defendant did not indicate whether he wanted the asset after testimony indicating a higher value was offered, the trial court had the authority to decide which party should be awarded the asset. The building was originally purchased to provide a location in which defendant could operate TAG Marine and the Huntington Bank mortgage is now in defendant's name only. In addition, the rental of the property provides some monthly income for defendant. Under these circumstances, the trial court did not err by awarding the asset to defendant. *Sparks*, 440 Mich at 151-152.

Defendant also argues that the parties had an agreement to have the personal property appraised and the division mediated and that the trial court erred by disposing of the personal property in a manner contrary to the agreement.

This Court upholds "the validity of property settlements reached through negotiation and agreement by the parties in a divorce action in the absence of fraud, duress or mutual mistake." *Howard v Howard*, 134 Mich App 391, 394; 352 NW2d 280 (1984). See also *Lentz v Lentz*, 271 Mich App 465, 474; 721 NW2d 861 (2006) (citing *Howard* and stating same rule of law). "This

rule applies whether the settlement is in writing and signed by parties or their representatives, or the settlement is orally placed on the record and consented to by the parties, even though not yet formally entered as part of the divorce judgment by the lower court." *Keyser v Keyser*, 182 Mich App 268, 270; 451 NW2d 587 (1990).

We conclude that the parties did not have a binding agreement on the record. "There must be a meeting of the minds on all the material facts in order to form a valid agreement, and whether such a meeting of the minds occurred is judged by an objective standard, looking to the express words of the parties and their visible acts." *Groulx v Carlson*, 176 Mich App 484, 491; 440 NW2d 644 (1989). From a review of all the relevant testimony, plaintiff's "agreement" on the record was equivocal at best. While she originally testified that she was agreeable to either mediate the issue of the personal property, or have an appraisal done and have values assigned, Saundra later indicated that she did not really think an appraisal was necessary and that it would be easier if Thomas would just give her a list of items he wanted. Such equivocation does not constitute an agreement placed on the record such that it is binding on the trial court. *Id.*; see also *Union v Ewing*, 372 Mich 181, 186; 125 NW2d 311 (1963) (stating that parties to a litigation must approve a consent decree as to both form and substance). Thus, the trial court did not err by dividing the parties' personal property. See *Olson*, 256 Mich App at 627 (noting that the trial court must make a determination of the property rights of the parties).

Finally, defendant argues that the trial court should have granted his request for an evidentiary hearing on the issue of attorney and expert witness fees. We agree.

This Court reviews for an abuse of discretion a trial court's award of attorney fees in a divorce action. *Hanaway*, 208 Mich App at 298. An abuse of discretion occurs when the result falls outside the range of principled outcomes. *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). However, findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007).

In a divorce action, attorney fees are awarded only as necessary to enable a party to prosecute or defend a suit. *Hanaway*, 208 Mich App at 298. "A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Id.* In part, attorney fees may be awarded in a divorce action where the party seeking the award cannot bear the expense of the action and the other party is able to pay. MCR 3.206(C)(2). "The party seeking attorney fees has the burden of showing facts sufficient to justify the award, which includes the amount of the claimed fees and their reasonableness. *Ewald v Ewald*, 292 Mich App 706, 725; 810 NW2d 396 (2011). "When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Reed v Reed*, 265 Mich App 131, 166; 693 NW2d 825 (2005).

The facts presented to the trial court established that defendant didn't have the ability or money to pay the fees and plaintiff did. On the basis of these facts, defendant should not have been expected to satisfy his attorney and expert witness fees out of his imputed income and should not be required to invade those assets he was awarded given plaintiff's assets and income. MCR 3.206(C)(2); *Hanaway*, 208 Mich App at 298.

The trial court abused its discretion by denying Thomas's request for attorney fees on the basis that he did not establish the amount and reasonableness of the fees at trial. *Hanaway*, 208 Mich App at 298. When defendant failed to establish the amount and reasonableness of the fees during the trial, the trial court was required to hold an evidentiary hearing on the issue; defendant's failure to present such supporting evidence at trial is not grounds for denying his claim. *Ewald*, 292 Mich App at 725; *Reed*, 265 Mich App at 166.

Affirmed as to the asset allocation, valuation of the marital property, and spousal support provisions, reversed as to the trial court's denial of defendant's request for attorney and expert witness fees, and remanded for an evidentiary hearing on the reasonableness and amount of the requested fees. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Michael J. Kelly
/s/ David H. Sawyer
/s/ Joel P. Hoekstra